

Opinion No. 45-4641

January 19, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. L. D. Wilson Office Engineer State Highway Department Santa Fe, New Mexico

{*7} Replying to your letter of January 17, 1945, requesting an opinion regarding the status of 1700 feet of State Highway No. 72, Colfax County, which has been acquired under the following conditions: Continuous use and maintenance for more than fifty years, no evidence of any action having been taken, as provided for in Section 58-405 of the N.M. 1941 Compilation, or any other proceeding necessary to establish a record by agreement or contract.

Your questions are as follows:

1. Ownership of title of the above mentioned 1700 feet of road?
2. Width of highway?
3. Right of State Highway Department to fence?
4. Allowing cattle on highway?

Answer to question 1:

The above strip of road, having been used, maintained and "dedicated" for a period longer than required by the Laws of New Mexico, Chapter 58, Article 1, Laws of 1941; having been declared a State highway, Chapter 49, Laws of New Mexico, Third State Legislature, 1919, the fee thereof has vested in the State of New Mexico "for highway purposes."

Answer to question 2:

The Board of County Commissioners, not having complied with Section 58-405 of the N.M. 1941 Compilation, or the State Highway Commission, Gallegos v. Conroy, 38 N.M. 154:

"State highway commission may acquire right of way and establish state highway in county {*8} without consent of board of county commissioners."

established the width of said strip of road on State Highway No. 72, the State of New Mexico has acquired title to a width necessary for maintenance, making repairs, safety and convenience of the traveling public. (Character and Extent of Highway, 39 Corpus Juris Secundum, Sec. 20, pages 937 and 938; Bayard v. Standard Oil Co., 63 P. 614,

38 Ore. 438.) We necessarily leave the actual width in fee acquired to the opinion of the State Highway Department.

Answer to question 3:

The side lines of the 1700 feet strip decided upon under the answer to question 2 would determine where the fence may be placed.

Answer to question 4:

Section 41-2304 of the N.M. 1941 Compilation makes the following provision:

"It shall be unlawful for the owner of any cattle, horses, mules, burros, swine, sheep, goats or other livestock to permit or allow any such animals to run at large upon any part of the public highways of this state which are fenced on both sides thereof."

By THOS. C. McCARTY,

Asst. Atty. General